SUPREME COURT, U. S.

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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1503

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Memorandum in Opposition contains several erroneous assertions which require a brief response:

1. The Memorandum (pp. 2-3) assumes that "Sears' basic contention is that the withholding of information by an agency in violation of the Freedom of Information Act results in such irreparable injury that the agency proceeding must be enjoined until the information is furnished, even though there are other adequate means for redressing that wrong." This assertion is incorrect. *First,* review was sought so that this Court could resolve the important question as to when the withholding of

information does constitute irreparable injury.[1] Sears did not argue that, in every such case, there is automatically irreparable injury; that test would be no more desirable than the converse standard adopted by the Court of Appeals which would virtually limit irreparable injury to Renegotiation Board proceedings. The correct criteria, in Sears' view (petition p. 2), is that the failure to properly produce requested documents establishes, as a matter of law, only a *prima facie* showing of irreparable injury. The agency would still be able to demonstrate—as it did not do here—that, in the circumstances involved, injunctive relief would materially prejudice the rights of the parties in the administrative proceeding or would otherwise be inappropriate. Cf., e.g., *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U. S. 235, 253-4 (1970). The issue, in any event, is one which, for the reasons set fort in the petition, warrants determination by this Court.

Second, Sears did not contend that the failure to promptly produce public documents could, apart from the exercise of a district court's equitable powers, be redressed in any other manner. There is, in fact, as described in the petition (pp. 9-10), no administrative or other remedy available to Sears, or a similarly-situated party before the Board, which would provide an adequate remedy to suffice for the refusal to timely comply with the requirements of the Freedom of Information Act.[2] It

1. This is a recurring issue (see *Wellman Industries, Inc.* v. *N. L. R. B.*, ... F. Supp. ...., 82 LRRM 2857 (No. 73-74) (D. C. S. C. Feb. 23, 1973); *Local 705, Truck Drivers* v. *NLRB*, ... F. Supp. ...., 82 LRRM 3014 (No. 94-73) (D. C. D. C. March 27, 1973); *Elsing Mfg. Co.* v. *NLRB*, ... F. Supp. ...., 83 LRRM 3054 (No. 73-30) (D. C. E. D. Okla., April 4, 1973); *Fire Alert* v. *NLRB* (No. C4782) (D. C. Col. 1973). Its national importance is underscored by the position taken by the Chamber of Commerce of the United States, demonstrated by its *amicus* brief filed in support of Sears' position.

2. Cf., e.g., *American Communications Association* v. *U. S.*, 298 F. 2d 648, 650-1 (2nd Cir. 1962), where the court noted: "Al-

is this absence of any alternative means of redress which distinguishes the instant case from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938)[a] and obviates the normal review procedure of labor cases provided for in Section 10(e) and (f) of the National Labor Relations Act.

2. The Memorandum (p. 4) is also incorrect in claiming that *Sears, Roebuck and Co.* v. *NLRB*, 433 F. 2d 210 (6th Cir. 1970), supports the decision below. In that case, as the District Court recognized here (Pet. for Cert., p. A9), the Board's decisional processes, rather than rights arising under the Freedom of Information Act, were at issue; "the form of relief which the plaintiff [there sought] would result in early judicial review of a Board decision on permissible discovery, not an order to produce records." 433 F. 2d at 211. Here, however, as in *The Renegotiation Board* v. *Bannercraft Clothing Company*, No. 72-822, there is no attempt to review administrative decisional processes nor obtain an appellate ruling as to the merits of any agency ruling. The controlling precedent, therefore, is *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919), where district courts were held to have jurisdiction to restrain agency action where, *inter alia*, there is "no *effective* way of presenting the claim of invalidity at a later date." (emphasis added.) See also *Jewel Companies, Inc.* v. *F. T. C.*, 432 F. 2d 1155 (7th Cir. 1970). It is, indeed, the conflict between the Seventh Circuit's decision in *Jewel*, and the District

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though 47 U. S. C. A. § 405 permits any evidence to be taken at the discretion of the commission on a rehearing at the petition of a non-party, this is not an effective substitute for the right to adduce evidence, to cross-examine witnesses, and to present arguments at the initial hearing."

3. Moreover, contrary to the Solicitor General's assertion, *Myers* did not involve nor was it intended to govern a claim of illegal procedure or a denial of an "opportunity to introduce evidence" (303 U. S. at 45), let alone a violation of an independent statutory right as here.

of Columbia Circuit's decision in this case, as well as the different standards of irreparable injury articulated in those two cases, which, in addition to the reasons set forth in the petition, make the question here presented an appropriate one for review by this Court.

Respectfully submitted,

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